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LFL Sdn Bhd v Jabatan Peguam Negara and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(IM)-390–07 OF 2021 AND W-01(IM)-393–07 OF 2021
YAACOB MD SAM, VAZEER ALAM AND MOHD NAZLAN JJCA
11 OCTOBER 2023

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Civil Procedure — Jurisdiction — Immunity of foreign sovereign — Appellant published article in Malaysia on method of execution of death penalty in Singapore — Issuance of correction direction by Government of Singapore — Whether courts in Malaysia had jurisdiction to consider relief could be given to person who complained that he could be affected adversely by law of another sovereign state acting possibly in violation of second principle ie extra-territorial application of Singapore's law in Malaysia in context of principle of comity between nations

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On 16 January 2020, the appellant published a press statement on their website alleging that the method of execution of the death penalty in Singapore was unlawful and brutal ('the 16th article'). The Government of Singapore directed the issuance of a correction direction dated 22 January 2020 ('the correction direction') to the appellant under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA'), and notified the appellant that: (a) the 16th article contained false statements of fact; (b) Singapore's Minister of Home Affairs ('the defendant'), in exercise of his statutory powers under the POFMA, directed the appellant to insert a correction notice ('the correction notice') not later than 23 January 2020 and failure to comply with the correction direction, without reasonable excuse, would amount to an offence under s 15 of the POFMA; (c) the appellant could apply to the defendant to vary or cancel the correction direction; and (d) in the event the application for variation or cancellation was refused, the appellant could appeal to the High Court of Singapore to set aside the correction direction. However, the plaintiff did not comply with the correction direction and, instead, proceeded to file the two applications in the High Court, by way of originating summons ('OS') ie OS 46 against the Government of Malaysia ('GOM') and OS 51 against the defendant. In OS 46, the appellant sought: (i) a declaration that the appellant had the rights to express their opinion in Malaysia with regard to any matters, pursuant to art 10(1)(a) of the Federal Constitution; (ii) a declaration that the appellant's rights could not be impaired by a law in Singapore, namely the POFMA, which purported to extend beyond Singapore, that was assuming extra-territorial jurisdiction; and (iii) a declaration that the appellant could not be subjected to any process within Malaysia in furtherance of the Singapore law. In OS 51, the appellant sought: (A) a declaration that the direction issued by the defendant could not be

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enforced against the appellant in Malaysia; (B) a declaration that the defendant, or anyone acting under his authority, could not take any action to enforce any provision of the POFMA against the appellant within Malaysia; and (C) an injunction to restrain the defendant, his servant or agents or anyone acting under his direction from enforcing Singapore's laws, in particular the POFMA, or taking any action related thereto, within Malaysia against the appellant. The GOM, as the defendant in OS 46, and the Attorney General of Malaysia ('AG'), as the intervener in OS 51, applied to strike out the appellant's OS on the grounds that: (1) the High Court in Malaysia had no jurisdiction to determine the validity of foreign legislation; (2) Malaysia recognised Singapore as a foreign sovereign and therefore Singapore enjoyed immunity; and (3) the appellant was seeking to use the process of the court in Malaysia to evade and escape from the enforcement of Singapore laws in Singapore. The High Court judge allowed both of the applications of the GOM and the AG. Hence, these appeals ie Appeal 390 against the AG and Appeal 393 against the GOM. The primary issue raised by the appellant in both appeals was whether and to what extent the courts in Malaysia had jurisdiction to consider whether or not relief could be given to a person who complained that he could be affected adversely by a law of another sovereign state acting possibly in violation of the second principle, ie, the extra-territorial application of Singapore's law in Malaysia in the context of the principle of comity between nations.

Held, allowing the appeals:

(1) The appellant's application for various reliefs and declarations concerned the issue of extra-territorial enforcement of certain Singapore laws in Malaysia ie POFMA. The issue raised by the appellant merited full and mature consideration. The appellant was not seeking the assistance of the High Court to adjudicate on the validity of a foreign law, ie the POFMA. The appellant's challenge was instead on the extent of application of Singapore law to a citizen or entity of this country, lawfully exercising within Malaysia his rights to freedom of speech as enshrined and guaranteed by the Federal Constitution. In coming to the decision to strike out both the OS, the High Court judge had failed altogether to address the very crucial and important point of law – ie of the applicability of the principle of comity of nations as regards extra-territorial effect of a national law. This was not a plain and obvious case for striking out the pleading as disclosing no reasonable cause of action. Nor were they frivolous, vexatious or may prejudice embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of process of the court. There were serious questions to be tried in the OS of both Appeal 390 and Appeal 393 as the cases involved a consideration and resolution of applicability of two principles grounded in the international law of comity of nations and extra-territorial jurisdiction (see paras 23, 26–27 & 29–30).

[Bahasa Malaysia summary

Pada 16 Januari 2020, perayu menerbitkan kenyataan akhbar di laman web mereka yang mendakwa bahawa kaedah pelaksanaan hukuman mati di Singapura adalah menyalahi undang-undang dan kejam ('artikel 16'). Kerajaan Singapura mengarahkan pengeluaran arahan pembetulan bertarikh 22 Januari 2020 ('arahan pembetulan') kepada perayu di bawah s 11 Akta Perlindungan daripada Kepalsuan dan Manipulasi Dalam Talian 2019 ('POFMA'), dan memaklumkan kepada perayu bahawa: (a) artikel 16 mengandungi kenyataan fakta yang palsu; (b) Menteri Dalam Negeri Singapura ('defendan'), dalam melaksanakan kuasa berkanunnya di bawah POFMA, mengarahkan perayu untuk memasukkan notis pembetulan ('notis pembetulan') tidak lewat dari 23 Januari 2020 dan kegagalan mematuhi arahan pembetulan, tanpa alasan yang munasabah, akan menjadi satu kesalahan di bawah s 15 POFMA; (c) perayu boleh memohon kepada defendan untuk mengubah atau membatalkan arahan pembetulan tersebut; dan (d) sekiranya permohonan untuk pengubahan atau pembatalan ditolak, perayu boleh membuat rayuan kepada Mahkamah Tinggi Singapura untuk mengetepikan arahan pembetulan tersebut. Walau bagaimanapun, plaintif tidak mematuhi arahan pembetulan dan, sebaliknya, meneruskan untuk memfailkan dua permohonan di Mahkamah Tinggi, melalui saman pemula ('OS') iaitu OS 46 terhadap Kerajaan Malaysia ('GOM') dan OS 51 terhadap defendan. Dalam OS 46, perayu memohon: (i) pengisytiharan bahawa perayu mempunyai hak untuk menyatakan pendapat mereka di Malaysia berkenaan sebarang perkara, mengikut perkara 10(1)(a) Perlembagaan Persekutuan; (ii) pengisytiharan bahawa hak perayu tidak boleh diganggu oleh undang-undang di Singapura, iaitu POFMA, yang dikatakan melangkaui di luar Singapura, yang mempunyai bidang kuasa luar wilayah; dan (iii) pengisytiharan bahawa perayu tidak boleh dikenakan sebarang proses dalam Malaysia dalam penerusan undang-undang Singapura. Dalam OS 51, perayu memohon: (A) pengisytiharan bahawa arahan yang dikeluarkan oleh defendan tidak boleh dikuatkuasakan terhadap perayu di Malaysia; (B) pengisytiharan bahawa defendan, atau sesiapa yang bertindak di bawah kuasanya, tidak boleh mengambil sebarang tindakan untuk menguatkuasakan sebarang peruntukan POFMA terhadap perayu dalam Malaysia; dan (C) injunksi untuk menghalang defendan, pekerjanya atau ejen atau sesiapa yang bertindak di bawah arahannya daripada menguatkuasakan undang-undang Singapura, terutamanya POFMA, atau mengambil sebarang tindakan berkaitan dengannya, dalam Malaysia terhadap perayu. GOM, sebagai defendan dalam OS 46, dan Peguam Negara Malaysia ('AG'), sebagai pencelah dalam OS 51, memohon untuk membatalkan OS perayu atas alasan: (1) Mahkamah Tinggi di Malaysia tidak mempunyai bidang kuasa untuk menentukan kesahan perundangan asing; (2) Malaysia mengiktiraf Singapura sebagai sebuah negara asing yang berdaulat dan oleh itu Singapura menikmati kekebalan; dan (3) perayu cuba menggunakan proses mahkamah di Malaysia untuk mengelak dan

melarikan diri daripada penguatkuasaan undang-undang Singapura di Singapura. Hakim Mahkamah Tinggi membenarkan kedua-dua permohonan GOM dan AG. Oleh itu, rayuan ini iaitu Rayuan 390 terhadap AG dan Rayuan 393 terhadap GOM. Isu utama yang dibangkitkan oleh perayu dalam kedua-dua rayuan adalah sama ada dan sejauh mana mahkamah di Malaysia mempunyai bidang kuasa untuk mempertimbangkan sama ada atau tidak pelepasan boleh diberikan kepada seseorang yang mengadu bahawa dia boleh terjejas secara negatif oleh undang-undang negara berdaulat lain yang bertindak mungkin melanggar prinsip kedua, iaitu, penggunaan luar wilayah undang-undang Singapura di Malaysia dalam konteks prinsip komiti antara negara.

Diputuskan, membenarkan rayuan-rayuan:

(1) Permohonan perayu untuk pelbagai relief dan pengisytiharan berkaitan dengan isu penguatkuasaan luar wilayah bagi undang-undang tertentu Singapura di Malaysia iaitu POFMA. Isu yang dibangkitkan oleh perayu memerlukan pertimbangan penuh dan matang. Perayu tidak meminta bantuan Mahkamah Tinggi untuk memutuskan kesahan undang-undang asing, iaitu POFMA. Cabaran perayu adalah mengenai sejauh mana penerapan undang-undang Singapura kepada warganegara atau entiti negara ini, yang secara sah menjalankan hak kebebasan bersuara mereka di Malaysia seperti yang tertakluk dan dijamin oleh Perlembagaan Persekutuan. Dalam membuat keputusan untuk membatalkan kedua-dua OS tersebut, hakim Mahkamah Tinggi telah gagal sama sekali untuk menangani titik undang-undang yang sangat penting dan utama – iaitu mengenai kebolehgunaan prinsip komiti antara negara berkaitan kesan luar wilayah undang-undang negara. Ini bukanlah kes yang jelas untuk membatalkan pliding kerana tidak mendedahkan kausa tindakan yang munasabah. Ia juga bukanlah kes yang remeh, menyusahkan atau boleh secara prejudis memalukan atau melewatkan perbicaraan tindakan yang adil atau bahawa pliding ini sebaliknya adalah satu penyalahgunaan proses mahkamah. Terdapat persoalan serius yang perlu dibicarakan dalam OS bagi kedua-dua Rayuan 390 dan Rayuan 393 kerana kes-kes tersebut melibatkan pertimbangan dan penyelesaian mengenai kebolehgunaan dua prinsip berasaskan undang-undang antarabangsa komiti antara negara dan bidang kuasa luar wilayah (lihat perenggan 23, 26–27 & 29–30).]

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign

and Commonwealth Affairs and others intervening); Janah v Libya (Secretary of State for Foreign and Commonwealth Affairs and others intervening) [2019] AC 777, SC (refd)
Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77, SC (refd)
Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (refd)
Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor [2016] 3 MLJ 553, FC (refd)
Hii Yii Ann v Deputy Commissioner of Taxation of The Commonwealth of Australia & Ors [2018] 7 MLJ 393, HC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 612, CA (refd)
Tan Keat Seng Kitson v Kerajaan Malaysia [1996] 1 MLJ 454, HC (refd)
The United States of America v Menteri Sumber Manusia & Ors and another appeal [2022] 4 MLJ 589; [2022] 1 LNS 1253, FC (refd)

Legislation referred to

Communication and Multimedia Act 1988 ss 4(1), 233
Courts of Judicature Act 1964 s 23
Federal Constitution art 10, 10(1)(a)
Protection from Online Falsehoods and Manipulation Act 2019 [SG] ss 11, 15, 15(1), 60
Rules of Court 2012 O 18 rr 19, 19(1), (1)(b), (1)(c), (1)(d), O 33 r 3
Summons and Warrants (Special Provisions) Act 1971 s 3

Appeal from: Originating Summons No WA-24–51–10 of 2021 (High Court, Kuala Lumpur)

Gurdial Singh Nijar (with Latheefa Koya, Kamarudin Abraham and Au Tian Hui) (Daim & Gamany) for the appellant.
Suzana bt Atan (with Atiqah bt Zainal Abidin) (Federal Counsel, Attorney General's Chambers) for the respondents.

Yaacob Md Sam JCA:

INTRODUCTION

[1] There are two related appeals before us which are as follows:

(a) Civil Appeal No W-01(IM)-390–07 of 2021 (Appeal 390'); and

(b) Civil Appeal No W-01(IM)-393–07 of 2021 ('Appeal 393').

Appeal 390 is the appellant's appeal against the decision of the High Court in Kuala Lumpur allowing the Attorney General Malaysia's striking out application of the appellant's Originating Summons No WA-24–51–10 of 2020 dated 2 October 2020 ('OS 51') against K Shanmugam, Minister of Home Affairs, Singapore.

The appellant's appeal in 393 is against the decision of the High Court in Kuala Lumpur allowing the respondent's striking out application of the appellant's Originating Summons No WA-24–46–09 of 2020 dated 18 September 2020 ('OS 46') against the Government of Malaysia ('GOM'). Both the striking out applications were heard together (collectively herein as 'the appeals').

[2] This is our unanimous decision. After considering counsels' full submission, both oral and written, we allowed both the appeals.

[3] We provide our reasons herein below.

BACKGROUND FACTS

[4] On 16 January 2020, the appellant published a press statement on their website https://www.lawyersforliberty.org/2020/16/18875 in which they alleged that the method of execution of the death penalty in Singapore was unlawful and brutal ('the 16th Article').

[5] The Government of Singapore directed the issuance of a correction direction dated 22 January 2020 ('the correction direction') to the appellant under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 ('the POFMA'), and notified the appellant that:

(a) the 16th Article contained false statements of fact;

(b) Singapore's Minister of Home Affairs ('the defendant'), in exercise of his statutory powers under POFMA, directed the plaintiff/appellant to insert a correction notice ('correction notice') not later than 23 January 2020 and failure to comply with the correction direction, without reasonable excuse, would amount to an offence under s 15 of the POFMA;

(c) the plaintiff could apply to the defendant to vary or cancel the correction direction; and

(d) in the event the application for variation or cancellation was refused, the plaintiff could appeal to the High Court of Singapore to set aside the correction direction.

[6] However, the plaintiff did not comply with the correction direction and,

instead proceeded to file the two applications in the High Court, by way of originating summonses ('OS'), namely OS 46 and OS 51.

[7] In OS 46 against GOM, the plaintiff sought the following reliefs:

(a) a declaration that the appellant has the rights to express their opinion in Malaysia with regard to any matters, pursuant to art 10(1)(a) of the Federal Constitution;

(b) a declaration that the appellant's rights could not be impaired by a law in Singapore, namely the POFMA, which purports to extend beyond Singapore, that is assuming extra-territorial jurisdiction; and

(c) a declaration that the appellant could not be subjected to any process within Malaysia in furtherance of the Singapore law.

[8] In OS 51, against the Singapore Home Affairs Minister, the appellant sought the following reliefs:

(a) a declaration that the direction issued by the defendant could not be enforced against the appellant in Malaysia;

(b) a declaration that the defendant, or anyone acting under his authority, could not take any action to enforce any provision of the POFMA against the appellant within Malaysia; and

(c) an injunction to restrain the defendant, his servant or agents or anyone acting under his direction from enforcing Singapore's laws, in particular the POFMA, or taking any action related thereto, within Malaysia against the appellant.

[9] Vide order dated 23 December 2020, the Attorney General of Malaysia was granted leave to intervene in OS 51. The Government of Malaysia, as the defendant in OS 46, and the Attorney General of Malaysia, as the intervener in OS 51, applied to strike out the plaintiff's OS on the grounds that they were scandalous, vexatious and frivolous and otherwise an abuse of the process of court.

[10] In brief, the GOM and AG's applications to strike out the appellant's OS 46 and OS 51 are premised on the following grounds:

(a) the High Court in Malaysia has no jurisdiction to determine the validity of foreign legislation;

(b) Malaysia recognises Singapore as a foreign sovereign and therefore Singapore enjoys immunity; and

(c) the appellant is seeking to use the process of the court in Malaysia to evade and escape from the enforcement of Singapore laws in Singapore.

A THE HIGH COURT'S DECISION AND REASONS

[11] Both the applications were heard together. The learned High Court judge has allowed the Government of Malaysia's application (encl 7) and the Attorney General of Malaysia's application (encl 29) to strike out both the appellant's OS 46 and OS 51 with no order as to costs.

[12] According to the grounds of judgment ('GOJ') of the learned High Court judge, inter alia:

(a) s 60 of the POFMA provides that, when an offence is committed by a person outside Singapore, that person may be dealt with in respect of that offence as if it had been committed within Singapore. Section 233 of the Communication and Multimedia Act 1988 ('the CMA') makes it an offence, inter alia, for a person to use a network facility or network services to initiate the transmission of any false communication with the intent to annoy, abuse, threaten or harass another person. Section 4(1) of the CMA stipulates that the CMA applies to both within and outside Malaysia;

(b) both OS 46 and OS 51 called for the court to determine the validity of the defendant's action against the plaintiff under the provision of the POFMA. However, the court was not seized with the jurisdiction to adjudicate on the validity of the POFMA. The law as to jurisdiction had to be strictly observed by the court, as set out in s 23 of the Court of Judicature Act 1964 which explicitly set out the general civil jurisdiction of the High Court. Both OS 46 and OS 51 were frivolous and vexatious and abuse of the process of the court, with no prospect to succeed;

(c) the Yang di-Pertuan Agong recognised Singapore as a foreign sovereign. A certificate to this effect was issued by the Secretary General of the Malaysian Ministry of Foreign Affairs. With the issuance of the certificate: (i) Singapore is clothed with sovereign immunity from the jurisdiction of this court; and (ii) this court was barred from exercising its jurisdiction to further inquire into the plaintiff's complaints in the OS;

(d) furthermore, the defendant, in issuing the correction direction pursuant to the provisions of the POFMA, was an act undertaken by the authority of sovereign State of Singapore. This was clearly a government act and therefore protected by sovereign immunity; and

(e) the present case comes within the category of plain and obvious case as envisaged in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 for the reason that both the OS are frivolous and vexatious and abuse of the process of the court.

[13] Aggrieved by the learned High Court's decision, the appellant filed

Appeal 390 against the AG and Appeal 393 against GOM.

THE APPELLANT'S SUBMISSION

[14] Learned counsel for the appellant contended that there are serious questions that need to be tried as the OS involved a consideration and resolution of applicability of two principles grounded in the international law of comity of nations, in the context of this case. The first principle grants immunity to a foreign state from being sued in another state in respect of its sovereign or governmental acts. The second principle limits the applicability of a country's laws to its own territory and its citizen within that territory.

[15] The issue that arises in the OS filed in respect of Appeal 390 is: whether and to what extent the court in one sovereign state has the jurisdiction to consider whether or not relief can be given to a person who complains that he could be affected adversely by a law of another sovereign state acting possibly in violation of the second principle. In other words, is the immunity granted under the first principle absolute such as to oust entirely the applicability of the second principle. And as such that the citizen will be denied access to justice in this country. Thus, this requires a full and mature consideration of the applicability and scope of an extra-territorial law in the context of the principle of comity between nations. It was further contended that based on this principle, a foreign state cannot rely on the principle of absolute immunity to oust the jurisdiction of the local court. It was also submitted that there is no reason why local courts are deprived of the jurisdiction to also consider this issue as to whether or not a law has extra-territorial effect; and the concomitant issue of its possible consideration as in this case to balance against or oust the immunity of sovereign nations. To allow extra-territorial effect of laws outright would result in an impairment of the appellant's guarantee of fundamental rights to freedom of speech under art 10 of the Federal Constitution. It was also contended that any person who genuinely perceives a threat to his freedom or adverse consequence is entitled to seek a declaration from our court to protect himself from the threatened action. The case of *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 was cited in support of the proposition. It was submitted that the High Court judge in allowing the striking out applications had failed altogether to address on point of law — of applicability of this principle of comity of nations as regards extra-territorial effect of a national law.

[16] Learned counsel further contended that the immunity to a foreign state may be denied if it violates two important principles, namely, fundamental rights, and access to justice. The case of *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening); Janah v Libya (Secretary of State for Foreign and Commonwealth*

Affairs and others intervening) [2019] AC 777 was cited in support of the argument. The principle in *Benkharbouche* was applied by the Federal Court in *Subramaniam a/l Letchimanan v The United States of America and another appeal* [2021] 5 MLJ 612 and *The United States of America v Menteri Sumber Manusia & Ors and another appeal* [2022] 4 MLJ 589; [2022] 1 LNS 1253. It was further submitted that the appellant is not questioning the validity of the Singapore law. Just that any such law should not be extended to citizens in Malaysia exercising their right to free speech. That is the thrust of the remedy that the appellant seeks from the court.

[17] It was also contended by the appellant that the Attorney General of Malaysia as intervener has no locus standi to object the OS at this stage of the proceedings when OS 51 in Appeal 390 has yet to be served on the defendant (Minister of Home Affairs Singapore). Thus, the AG has no right to strike out this action when the defendant has not been served and not taken any such course of action. Several cases were cited to support the argument: *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77 (SC); *Hii Yii Ann v Deputy Commissioner of Taxation of The Commonwealth of Australia & Ors* [2018] 7 MLJ 393; *Subramaniam a/l Letchimanan v The United States of America and another appeal* [2021] 5 MLJ 612.

THE RESPONDENTS' SUBMISSION

[18] Learned senior federal counsel ('SFC') for the respondents submitted that in both cases jurisdiction is a fundamental and threshold issue. Making reference to s 23 of the Court of Judicature Act 1964, the SFC contended that the general civil jurisdiction of the High Court provides that its limited within the local jurisdiction of the court. Jurisdiction therefore is a limiting factor to the power of the High Court to deal with a subject matter. SFC further contended that there is a significant difference between 'jurisdiction' and 'power'. Jurisdiction relates to the type of such matter which the court may deal with, whereas its powers may be exercised only in relation to that jurisdiction. The case of *Tan Keat Seng Kitson v Kerajaan Malaysia* [1996] 1 MLJ 454; *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553; *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771 were cited to support the argument.

[19] On point of sovereign immunity, SFC submitted that in Malaysia the courts have adopted the theory of 'restricted' sovereign immunity rather than absolute immunity. Absolute immunity would mean that any proceedings against a foreign state are inadmissible unless that state expressly agrees to waive such immunity, whereas restrictive immunity would mean that the immunity is only available in respect of sovereign activities or governmental acts (*acta jure*

imperil) and not acts of a commercial nature (*acta jure gestionis*). The case of *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77 and *Hii Yii Ann v Deputy Commissioner of Taxation of The Commonwealth of Australia & Ors* [2018] 7 MLJ 393 were cited to support the argument. It was further submitted that the certificate issued by the Yang di-Pertuan Agong vide the Secretary General of Malaysia Ministry of Foreign Affairs (Wisma Putra) had recognised Singapore as a foreign sovereign. As such, Singapore is clothed with sovereign immunity from the jurisdiction of courts in Malaysia exercising jurisdiction to inquire into the appellant's complaints in the two OS. SFC further submitted that the act of Singapore Home Affairs Minister in issuing the correction direction pursuant to the provisions of POFMA was an act undertaken by the authority of sovereign state of Singapore that is governmental act (*acta jure imperil*) and therefore protected by foreign immunity.

OUR DECISION

[20] These appeals are against the decision of the High Court allowing the striking out application made by the respondents pursuant to O 18 r 19 of the Rules of Court 2012.

[21] Since we are concerned here with the question of striking out pleadings under O 18 r 19, we do not propose to go into the facts and documents in any more detail than is necessary.

[22] With regard to the principles for striking out pleadings, there are well explained and expounded by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 where Ramly Ali FCJ stated that:

> [25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see *Bandar Builder*, *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1999] 1 QB 86; *AG of Duchy of Lancaster v London and North Western Rly Co* [1892] 3 Ch 274).
>
> [26] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:
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> (a) it is only in plain and obvious case that recourse should be had to the summary process under the rule;
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> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*' (Emphasis added);

(c) it cannot b exercised by a minute examination of the document and facts in order to see whether the party has a cause of action or defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 33 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defence raised are not arguable.

[27] The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473, had adopted the well settled principle of striking out in the following passage:

> A striking out should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of facts that is capable of resolution only after taking viva voce evidence during trial, (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court) ...

The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issue of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend not to decide difficult question of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial ...

This passage was cited with approval by Privy Council in a Malaysian case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212.

[23] Coming back to the instant appeals. From the OS 46 and OS 51, it is clear to us that the appellant's application for various reliefs and declarations concern the issue of extra-territorial enforcement of certain Singapore laws in Malaysia ie POFMA. On that account, it means that the issue of extra-territorial enforcement of a foreign law in Malaysia and the jurisdiction of Malaysian courts vis a vis that foreign law would have to be dealt with

following mature discussion and consideration by the court. Learned counsel for the appellant argued that the Federal Constitution protects the appellant's rights to freedom of expression and it is unfair to penalise the appellant in favour of a foreign law, the application of which is unsettled in Malaysia. It is our view that the issue raised by the appellant merits full and mature consideration. We agree that there are serious questions to be tried in both originating summons. In particular the two principles of comity of nations raised by the appellant was not considered at all by the learned High Court judge. The first principle grants immunity of a sovereign state from being sued in another state in respect of its sovereign or government acts; and the second principle limits applicability of a country's law to its own territory. In this regard, it is useful to refer to *Bennion on Statutory Interpretation*, (7th Ed), p 118:

> In general, the principle of comity between nations requires that each sovereign state should be exclusively allowed to govern its own territory. So an Act does not usually apply to acts or omissions taking place outside its territory, whether they involve foreigners or Britons.

[24] We agree with the submission of learned counsel for the appellant that there are serious issues raised in both the OS that requires further serious argument. The primary issue raised by the appellant in both appeals is whether and to what extent the courts in Malaysia have jurisdiction to consider whether or not relief can be given to a person who complains that he could be affected adversely by a law of another sovereign state acting possibly in violation of the second principle, ie the extra-territorial application of Singapore's law in Malaysia in the context of the principle of comity between nations.

[25] The learned High Court judge decided that the appellant was seeking the court's pronouncement on the validity of a Singapore law, ie the POFMA, and in this regard the learned judge stated as follows:

> [16] Based on the above, I am of the considered opinion that this court does not have the jurisdiction to adjudicate on the validity of the POFMA.

[26] However, with respect, this is not the crux of the appellant's case. The appellant is not seeking the assistance of the High Court to adjudicate on the validity of a foreign law, ie the POFMA. The appellant's challenge was instead on the extent of application of Singapore law to a citizen or entity of this country, lawfully exercising within Malaysia his rights to freedom of speech as enshrined and guaranteed by the Federal Constitution. In other words, the question is to what extent, if any, may the laws of one sovereign state have extra-territorial effect in another sovereign states in the context of comity among nations. We believe that this is the first time such a question has been brought to our courts and it is an important enough issue to be given in-depth

consideration by the court. This is even more so when considering the potential legal consequences to the appellant arising from non-compliance to the correction direction. Under s 15(1) of the POFMA a person can be imprisoned or fined (or both) for non-compliance of a correction direction. Hence, it is clear that the appellant faces potential criminal sanction and penalty for any alleged breach of POFMA, and the Singapore authorities may have recourse to the Summons and Warrants (Special Provisions) Act 1971 to enforce the appearance of the appellant in Singapore in respect of the alleged offence. Pursuant to s 3 of the Act, a magistrate in Malaysia is empowered to issue a summons for a person to appear in a Singapore Court if satisfied that it is a valid summons issued by a Singapore Court requiring the appearance of that person.

[27] The situation is very unique. The appellant is a Malaysian entity. The offending publication by the appellant, ie the 16th Article, was published by the appellant in its website in Malaysia. The correction direction was served on the appellant in Malaysia, directing the appellant to insert a correction notice before the stipulated date. The appellant failed and/or refused to do as directed. This is an offence under POFMA in Singapore. The appellant can be summoned to appear in a Singapore Court through the assistance of the Malaysian Courts pursuant to the Summons and Warrants (Special Provisions) Act 1971. In such a situation, where Malaysia has some treaty obligations to render assistance to the Singapore authorities, it becomes even more imperative for the issue raised the appellant in both OS be given the consideration that they deserve, instead of being summarily struck out. In coming to the decision to strike out both the OS, the High Court judge had failed altogether to address this very crucial and important point of law — ie of the applicability of the principle of comity of nations as regards extra-territorial effect of a national law.

[28] Thus, upon the facts and allegations pleaded in the pleadings, which we have highlighted above, can it be said that the OS applications disclose no reasonable cause of action, for the High Court to exercise its power to strike out the pleadings under O 18 r 19(1)? Secondly based on the conflicting affidavits in support of the applications, can the High Court exercise its power under the said order or under its inherent jurisdiction to strike out the same pleadings on the ground that they are frivolous or vexatious or may prejudice embarrass or delay the fair trial of the action or these pleadings are otherwise an abuse of the process of the court under r 19(1)(b), (c) or (d) of O18? (see *Bandar Builder*).

[29] Bearing in mind the established principles stated above, we say that this is not a plain and obvious case for striking out the pleading as disclosing no reasonable cause of action. Nor can we say that they are frivolous, vexatious or may prejudice embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of process of the court. To that extent we find that the learned High Court had erred.

[30] It has been said that so long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. The court should only strike out a suit sparingly and only when it is bound to fail at trial. We are of the considered view that there are serious questions to be tried in the OS of both Appeal 390 and Appeal 393 as the cases involved a consideration and resolution of applicability of two principles grounded in the international law of comity of nations and extra-territorial jurisdiction. The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the Rules of Court 2012.

CONCLUSION

[31] In view of the reasons as discussed above, we hold that both the decisions of the High Court allowing the striking out applications of the respondents is plainly wrong, which therefore warrants appellate intervention.

[32] As such, both appeals are allowed and we set aside the orders of the High Court. Both matters are remitted to the High Court. We made no order as to costs.

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh